No. 79-383

In the Supreme Court of the United States

OCTOBER TERM, 1979

F. W. STANDEFER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The court of appeals panel wrote no opinion. The opinion of the court en banc (Pet. App. 1a-72a) is not yet reported. The opinion of the district court (Pet. App. 75a-112a) is reported at 452 F. Supp. 1178.

JURISDICTION

The en banc judgment of the court of appeals was entered on August 10, 1979. The petition for a writ of certiorari was filed on September 6, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a defendant charged with aiding and abetting the commission of an offense may be convicted after the principal has been acquitted.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted of four counts of making gifts to a public official, in violation of 18 U.S.C. 201(f) (counts 2, 4, 6, and 8), and of five counts of aiding and abetting a revenue official in accepting compensation in addition to that authorized by law, in violation of 26 U.S.C. 7214(a)(2) (counts 1, 3, 5, 7, 9).[1] Petitioner was sentenced to concurrent two-year prison terms, all but six months of which were suspended in favor of probation, and he was fined $2,000 on each count. The en banc court of appeals affirmed (Pet. App. 1a-72a).

The facts are set forth in the opinion of the court of appeals (Pet. App. 2a-8a). Briefly, the evidence showed that between 1971 and 1974 petitioner was the Vice-President of Tax Administration of Gulf Oil Corporation, and Cyril J. Niederberger was an Internal Revenue Service agent charged with auditing Gulf's federal income tax returns. During that time, Gulf, acting through petitioner, paid transportation, hotel, meal, and other expenses in connection with four golf vacations taken by Niederberger in Miami, Las Vegas, Pebble Beach, California, and Absecon, New Jersey, respectively. Gulf also paid Niederberger's hotel bill in connection with a trip to Pompano Beach, Florida. The Miami, Las Vegas, Pebble Beach, and Absecon trips were each the subject of one count of violating 18 U.S.C. 201(f) and one count of violating 26 U.S.C. 7214(a)(2). The Pompano Beach trip was the subject of one count of violating 26 U.S.C. 7214(a)(2).

[1]Petitioner was indicted together with Gulf Oil Corporation and its chief federal tax administrator, Joseph Fitzgerald. Gulf pleaded guilty and Fitzgerald pleaded nolo contendere to all counts of the indictment.

Prior to petitioner's trial, Niederberger was tried on a ten-count indictment charging violations of 26 U.S.C. 7214(a)(2) and 18 U.S.C. 201(g), which proscribes the acceptance of gifts by public officials, in connection with each of the five trips. Niederberger was acquitted on both counts involving the Pompano Beach trip and convicted on both counts involving the Las Vegas vacation and both counts involving the Pebble Beach vacation. As to the Miami and Absecon trips, he was acquitted of violating 26 U.S.C. 7214(a)(2), but convicted of violating 18 U.S.C. 201(g).

ARGUMENT

In his petition for a writ of certiorari, petitioner challenges only the three counts charging that he aided and abetted violations of 26 U.S.C. 7214(a)(2) in connection with the Miami, Absecon, and Pompano Beach trips.[2] In making this challenge, he does not contend that the evidence at his trial was insufficient to establish that Niederberger violated the statute or that petitioner aided and abetted the violation. Rather, he argues that his convictions were barred by Niederberger's prior acquittal on charges of violating the statute in connection with the same three transactions. The court of appeals properly rejected petitioner's claim in a comprehensive opinion upon which we principally rely.

1. The common law imposed various restrictions upon the manner of trying persons charged as accessories to crime. No such restrictions are contained, however, in the general federal aiding and abetting statute (18 U.S.C. 2) or in the Federal Rules of Criminal Procedure. In fact, as the court of appeals observed (Pet. App. 10a-17a), in

[2]Since the prison sentences petitioner received on the nine counts on which he was convicted were all concurrent, what is at stake here is only $6,000 in fines on the three challenged counts.

enacting the first federal aiding and abetting statute in 1909 Congress clearly intended to change the common-law rule that an accessory before the fact could not be convicted unless the principal had previously been or was simultaneously convicted. While the Senate Report (S. Rep. No. 10, 60th Cong., 1st Sess. 13 (1908)), which expressly states that Congress intended to allow for the prosecution of an accessory where the principal has died, been pardoned, or simply not yet been tried, does not speak to the circumstance in which the principal has been acquitted, the Report's enumeration does not purport to exhaust all the situations in which the statute changes the common law. If Congress had intended to bar the prosecution of an accessory where the principal has been tried and acquitted, it could easily have said so. Thus, petitioner would have this Court read into the statute an exception that finds no support in either the language of the statute or its legislative history. This the court of appeals correctly declined to do.

2. This case raises no substantial constitutional issue. No violation of either the Due Process or Double Jeopardy Clause inheres in the conviction of an aider and abettor following the acquittal of the principal. In the prosecution for aiding and abetting, the government must establish beyond a reasonable doubt the guilt of both the defendant and the principal, and it may attempt to do so only once as against the defendant. The mere fact that inconsistent verdicts may have been reached by different juries is not a ground for complaint, for much the same reasons that verdicts reached as to a single defendant by the same jury are not subject to challenge on grounds of inconsistency. *Hamling* v. *United States*, 418 U.S. 87, 101 (1974); *United States* v. *Dotterweich*, 320 U.S. 277, 279 (1943). In this case, for example, the acquittals of Niederberger on charges of violating 26 U.S.C. 7214(a) in

connection with the Miami and Absecon trips and his convictions of charges of violating 18 U.S.C. 201(g) in connection with the same trips might well have constituted a compromise verdict. Niederberger could not have challenged his convictions as to these two trips on the ground that they were inconsistent with his acquittals as to the same trips. It makes little sense to permit petitioner to exploit arguable inconsistencies between his convictions and prior acquittals that may well have represented " 'no more than [the jurors'] assumption of a power which they had no right to exercise, but to which they were disposed through lenity.' " *Dunn* v. *United States*, 284 U.S. 390, 393 (1932).

3. Moreover, the court of appeals properly adhered to the well-settled rule that a criminal defendant may not invoke the doctrine of collateral estoppel based on the result of a prior prosecution of a different defendant. See *United States* v. *Peltier*, 585 F. 2d 314, 335 (8th Cir. 1978), cert. denied, No. 78-893 (Mar. 5, 1979); *United States* v. *Brown*, 547 F. 2d 438, 444 (8th Cir.), cert. denied, 430 U.S. 937 (1977); *United States* v. *Musgrave*, 483 F. 2d 327, 332 (5th Cir.), cert. denied, 414 U.S. 1023 (1973); Annot, 9 A.L.R. 3d 203, 218-220 (1966). As this Court pointed out in *Ashe* v. *Swenson*, 397 U.S. 436, 443 (1970) (emphasis supplied):

> "Collateral estoppel" is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated *between the same parties* in any future lawsuit.

Important policy considerations militate against limiting or barring the prosecution of one defendant because of the outcome of the trial of another defendant—even if, as here, the latter's guilt is an essential element of

the former's. Criminal responsibility is personal and individual, and, as indicated above, an acquittal of a principal does not necessarily mean that the jury entertained a reasonable doubt as to his guilt. Furthermore, very often constitutional and other restrictions on the admission of evidence impose on the proof against one defendant limitations that do not apply as to other defendants.[3]

In civil litigation, allowing different defendants to assert collateral estoppel in successive actions brought by the same plaintiff is thought to promote judicial economy by encouraging the plaintiff to join all the defendants in the same action. See *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322 (1979); *Blonder-Tongue* v. *University Foundation*, 402 U.S. 313 (1971). In criminal cases, on the other hand, the government, which is as likely as the courts to find its resources overtaxed by the volume of potential criminal cases, normally needs no encouragement to seek to try as many defendants together as it fairly can. On the contrary, if defendants are permitted to benefit from favorable results in trials of co-defendants, there is every reason to expect increased numbers of

[3]The restriction imposed by the Confrontation Clause on the admissibility of co-defendants' confessions is a common example. If one charged with aiding and abetting the commission of a crime makes a valid out-of-court confession that tends to show not only his own involvement, but also the actual commission of the offense by the principal, and if the aider and abettor then chooses not to testify at trial, the confession would be admissible against its maker but not against the principal. See *Bruton* v. *United States*, 391 U.S. 123 (1968). The exclusionary rule for Fourth Amendment violations furnishes another example. Evidence suppressed as to a principal because obtained in an unlawful search of his house will be admissible against any aider and abettor whose own privacy rights were not violated by the search. See *Rakas* v. *Illinois*, 439 U.S. 128 (1978).

severance motions and considerable procedural maneuvering by groups of co-defendants seeking to have tried first the one of their number as to whom the government's case is weakest.

As the court of appeals noted (Pet. App. 25a), petitioner "has suffered no encroachment on his liberty." His constitutional rights were observed, and his trial was fair.[4] Relying on a "social purposes" defense, he admitted that he had arranged for the payment of Niederberger's travel expenses (Tr. 985). Co-defendant Gulf Oil pleaded guilty and co-defendant Joseph Fitzgerald nolo contendere to all counts of the indictment. Niederberger himself was convicted on a number of counts of a similar indictment. There is no reason in logic or policy why a "classic example of somewhat inconsistent jury verdicts" (Pet. App. 39a) in the Niederberger trial should bar petitioner's conviction on any counts.

4. Finally, as the en banc court further found (Pet. App. 17a-21a), its decision in this case is in accord with the weight of authority. See, *e.g.*, *United States* v. *Musgrave*, *supra*; *United States* v. *Azadian*, 436 F. 2d 81 (9th Cir. 1971); *Pigman* v. *United States*, 407 F. 2d 237 (8th Cir. 1969); *Gray* v. *United States*, 260 F. 2d 483 (D.C. Cir. 1958). See also *United States* v. *Coppola*, 526 F. 2d 764, 776 (10th Cir. 1975). With two exceptions, the

[4]Petitioner suggests (Pet. 20) that the district court improperly instructed the jury that it was not necessary for the government to show that petitioner or Gulf Oil Corporation received quid pro quo for the trips, *i.e.*, that Gulf's tax returns or Niederberger's audit were incorrect (see Instruction Tr. 20-21, 50). The court's instruction was correct, however. *United States* v. *Niederberger*, 580 F. 2d 63 (3d Cir.), cert. denied, 439 U.S. 980 (1978). The court gave complete instructions on criminal intent and on petitioner's principal theory of defense, *i.e.*, that the trips were given purely out of friendship (see Instruction Tr. 20-25, 46-50).

cases relied upon by petitioner are distinguishable. *United States* v. *Bernstein*, 533 F. 2d 775, 799 (2d Cir.), cert. denied, 429 U.S. 998 (1976); *United States* v. *Stevison*, 471 F. 2d 143 (7th Cir. 1972), cert. denied, 411 U.S. 950 (1973); and *United States* v. *Hoffa*, 349 F. 2d 20, 40 (6th Cir. 1965), aff'd, 385 U.S. 293 (1966), stand for the proposition that, in prosecuting an aider and abettor, the government must prove the guilt of the principal. The government clearly did so in trying petitioner as an aider and abettor in this case. In *United States* v. *Smith*, 478 F. 2d 976 (D.C. Cir. 1973), an aiding and abetting conviction was reversed in connection with the reversal of the principal's murder conviction on the ground that the prosecuting attorney had improperly discouraged an eyewitness from giving testimony that tended to show that the principal had acted in self-defense. The testimony in question was relevant to the question whether the government had proved that any crime had been committed, and the improper conduct on the part of the prosecutor was as prejudicial to the aider and abettor as it was to the principal.

The Fourth Circuit alone has taken the position that an aiding and abetting conviction cannot stand alongside an acquittal of the principal, regardless of the order in which the two prosecutions are brought. *United States* v. *Shuford*, 454 F. 2d 772, 779 (4th Cir. 1971); *United States* v. *Prince*, 430 F. 2d 1324 (4th Cir. 1970). In *Prince*, a conviction for aiding and abetting was reversed because, while the appeal was pending, the principal was acquitted. In *Shuford*, an aiding and abetting conviction was vacated because the principal's conviction had been reversed on grounds that his severance motion should have been granted. The court indicated that the vacated aiding and abetting conviction would be reinstated if the principal were convicted in his retrial, but would be reversed if the principal were acquitted.

In both cases, the Fourth Circuit relied solely on this Court's decision in *Shuttlesworth* v. *Birmingham*, 373 U.S. 262 (1963). In *Shuttlesworth*, however, the Court held simply that there can be no conviction for aiding and abetting where the principal committed no crime. The decision did not involve the question whether an aiding and abetting conviction is barred by prior acquittal of the principal where, as here, the government is able to prove the commission of an offense by the principal in the aiding and abetting trial.

We submit that the *Prince* and *Shuford* decisions constitute erroneous applications of a common-law rule that has clearly been changed by Congress. They are isolated deviations in the case law on the question presented in this case, and as such, they may well in time be corrected. In our view, the conflict in circuits they create is not presently of sufficient importance to warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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